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Nos. 85-1239 and 85-1406

In the Supreme Court of the United States

OCTOBER TERM, 1986

AMOCO PRODUCTION COMPANY, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In their submissions, respondents and amici repeat the arguments that Congress intended Section 810 of ANILCA, 16 U.S.C. 3120 to apply throughout the OCS *and* that Congress specifically required the judicial issuance of broad injunctive relief in virtually all cases in which Section 810 is violated, thereby relieving a person seeking to enjoin an ongoing federal program from making the traditional showing required to obtain such extraordinary relief. As we explained in our opening brief and further show in this submission, neither proposition is tenable. Respondents also reiterate their claim that the Secretary violated Section 810

by failing to implement procedural requirements at the lease sale stage that, in their view, were triggered because of a mere possibility of significant subsistence restrictions at the development and production stage. Under respondents' view, however, all Section 810 review of the OCS planning process would have to occur at the initial lease sale stage, in contravention of the rationale of this Court's decision in *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984). Finally, respondents replace the court of appeals' misapplication of the rules governing retroactive application with their own erroneous argument that retroactivity is not at issue in this case at all. We respond to each of respondents' contentions below.

1. In our opening brief (Br. 17-27), we explained that the court of appeals reversed the district court's denial of preliminary injunctive relief on the erroneous ground that a court has a "duty" to enter an injunction when it finds a violation, or likely violation, of a procedural environmental statute, except in "unusual circumstances" (see Pet. App. 15a). We established, moreover, that the district court properly applied traditional principles of equity in denying respondents' request for injunctive relief (see Br. 18, 27). Respondents' response is two-fold: first, in an understandable effort to distance themselves from the court of appeals' rationale, respondents primarily contend (Br. 42-44) that traditional equitable principles support a grant of preliminary injunctive relief; and, second, respondents alternatively attempt to support the court of appeals' ruling by contending (*id.* at 44-48) that Section 810 of ANILCA evinces congressional intent to compel the issuance of injunctive relief in this case. Both contentions are unavailing (even on the assumption, which we also contest, that Section 810 applies to this case).

a. First, respondents' argument that the court of appeals could have granted preliminary injunctive relief on the basis of traditional equitable principles is misdirected because it misapprehends the procedural posture of the case. The district court applied traditional equitable

principles and, on that basis, properly *denied* respondents' request for preliminary injunctive relief. The district court concluded that "[t]he balance of irreparable harm does *not* favor the [respondent]" and that "[t]he public interest favors continued oil exploration" (Pet. App. 43a (emphasis in original)). Hence, the only issue before the court of appeals was whether the district court's decision amounted to an abuse of discretion. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-932 (1975). Neither the court of appeals nor respondents, however, have shown that such an abuse of discretion occurred.

The court of appeals did not question the district court's findings that "delay in the exploration of the OCS may cause irreparable harm to this nation's quest for new oil resources and energy independence" and that "exploration will not significantly restrict subsistence resources" (Pet. App. 43a). Instead, the court of appeals faulted the district court because, having found that there was a strong likelihood that the Secretary had violated Section 810, the district court had a "duty to issue an injunction" (Pet. App. 15a). According to the court of appeals (*id.* at 15a, 19a-21a), Congress intended federal courts to presume that respondents would be "irreparabl[y] harm[ed]," absent injunctive relief, and that the "public interest" automatically favored issuance of such relief. Thus, the sole basis upon which the court of appeals' reversal of the district court's denial of preliminary injunctive relief could be upheld is that Section 810 evinces specific congressional intent to limit the traditional equitable discretion of federal courts to deny the issuance of preliminary injunctive relief even where, as in this case, the movants have failed to establish either that irreparable harm would otherwise result or that the public interest favors such an extraordinary remedy.[1]

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[1] The court of appeals did reject the district court's conclusion that the "public interest" favored rejection of respondents' request for injunctive relief (see Pet. App. 23a n.2 ("Congress has chosen the protection of subsistence life over oil exploration")), but as dis-

Respondents nonetheless invite (Br. 42-44) this Court to reconsider the district court's findings that exploration poses no danger of irreparable harm to subsistence uses and that an injunction would cause the federal government irreparable harm. Relitigation in this Court of factual matters previously decided by the trial court, and not found to be clearly erroneous by the court of appeals, however, is inappropriate. In any event, the district court's findings are fully supported by the record in this case, particularly by the similar findings contained in the Department's Section 810 evaluation (see Pet. App. 103a, 106a). Respondents, moreover, cannot rely on predictions of events that might occur, if at all, only at a later stage (development and production) to dispute findings concerned solely with the exploration stage (see Resp. Br. 43 nn.33 & 34).[2] Finally, respondents' contention (Br. 42) that the federal government failed to establish that an injunction would harm any "governmental proprietary interest" is beside the point. Where, as in this case, the government has established that injunctive relief would irreparably harm "this nation's quest for new oil resources and energy independence" (Pet. App. 43a)—an interest of explicit congressional concern (see 43 U.S.C. 1332 (3))—the government need not also show any injury in its proprietary capacity.[3]

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cussed in our opening brief (Br. 25-26 & n.16), that ruling was erroneous as a matter of law.

[2] Respondents cannot rely on any asserted inadequacy in the environmental analysis regarding leasing to supply a basis for enjoining exploration, because the latter is a distinct planning phase. Cf. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407 n.16 (1976). Respondents notably never challenged, pursuant to 43 U.S.C. 1349(c), the Secretary's approval of the exploration plans in the two lease sale areas (see Fed. Pet. Br. 6, 9).

[3] Respondents (Br. 42) incorrectly state that the government "[t]acitly conced[ed] that [it] would suffer no harm if the courts authorized injunctive relief." In fact, the Secretary identified two types of irreparable harm that an injunction would cause: (1) irreparable harm to efforts under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. II) 1331 *et seq.*, to assess expedi-

b. Respondents alternatively argue (Br. 44-48) that the court of appeals' decision is correct because Congress intended to limit the traditional equitable jurisdiction of federal courts to fashion remedies to redress violations of Section 810 of ANILCA. To support this view, respondents and their supporting amici point out that Section 810's procedural requirements are mandatory and must be complied with prior to the particular disposition of public lands to which they relate. See, *e.g.*, Resp. Br. 46-48; Amici California, et al., Br. 14-17; Amici NRDC, et al., Br. 16-17. As explained in our opening brief (Br. 22-27), however, neither the obligatory nature of Section 810's procedural requirements nor the timing of their application sufficiently evinces congressional intent to circumscribe the traditional authority of a federal court to fashion a remedy that is responsive to the equities of a particular case.

Most fundamentally, respondents and their supporting amici have confused the threshold question of whether a mandatory statutory requirement has been violated with the distinct and separate inquiry of whether Congress has intended to require courts to enforce certain remedies once such a violation has been established in a particular case. We do not dispute that Section 810's procedural requirements are mandatory. Nor do we contest that Congress intended that Section 810's procedural requirements would be met prior to the particular decision of the Secretary to which they relate. As discussed in our opening brief (Br. 19-21), we posit only that under this Court's decision in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), neither factor suffices to show that Congress intended to curb the traditional authority of the federal courts, once a violation of Section 810 has been estab-

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tiously the extent of oil and gas resources offshore Alaska; and (2) irreparable harm to efforts to gather geological information necessary for planning the next lease sale in Norton Sound. See Fed. Defs. Opp. to Plaintiffs' Mot. for Preliminary Injunction 25-28; Fed. Appellee's Br. 44-47 (*Gambell II*).

lished, to fashion remedies that are responsive to the facts of the particular case at hand.[4]

Respondents and amici argue that this case, unlike *Romero-Barcelo* and like *TVA* v. *Hill*, 437 U.S. 153 (1978), involves an "absolute" duty and, therefore, as in the latter case, Congress must be deemed to have "specifically required" issuance of sweeping injunctive relief and to have barred district court consideration of the application of traditional equitable principles to the facts of the case.[5] Respondents' analysis is flawed, however, because the controlling question is not whether a statutory duty is "mandatory" or "absolute"; the statutory prohibition at issue in *Romero-Barcelo*—Section 301 of the Clean Water Act, 33 U.S.C. 1311(a) (see 33 U.S.C. 1323(a))—was as uncompromising in nature as Section 810 and did not prevent this Court from concluding in that case that injunctive relief was not automatically required. See 456 U.S. at 313 ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law").

Instead, as we explained in our opening brief (Br. 21-22), the controlling issue in this case is whether a non-injunctive remedy (or even a narrowly-drawn injunctive remedy) may be fashioned that "neither ignore[s] the statutory violation nor undercut[s] the purpose and function of the [relevant statutory provision]" (*Romero-Bar-*

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[4] Cf. *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 6 ("We would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake. When, as here, there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended for the agency to lose its power to act.").

[5] Respondents apparently abandon the two other grounds on which the court of appeals purported to distinguish *Romero-Barcelo* (see Pet. App. 22a-23a & n.2): (1) "in enacting Section 810, Congress has chosen the protection of subsistence life over oil exploration" and (2) *Romero-Barcelo* involved a permanent rather than a preliminary injunction. See Fed. Pet. Br. 25 n.14, 25-26 & n.16.

celo, 456 U.S. at 315). On this basis, in *TVA* v. *Hill*, this Court inferred congressional intent to withdraw the district court's equitable discretion because the very objects of the relevant statute's substantive provisions, which, unlike this case, flatly banned certain adverse impacts (see 456 U.S. at 314), would have been irretrievably jeopardized. By contrast, here, as we have shown (see Fed. Pet. Br. 23-27), and as the district court found (Pet. App. 43a), continued exploration while the Secretary reexamines potential impacts on subsistence uses "will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent" (*ibid.*).

In addition, there is no reason to assume that the procedural objectives of Section 810 will be subverted, as respondents and amici claim, by allowing continuing exploration. As described in our opening brief (Br. 4-5, 7-8, 9), the Department of the Interior had already given substantial consideration to subsistence impacts prior to holding the two lease sales and, at the time of the district court's ruling, had reevaluated subsistence under the specific dictates of ANILCA. The Secretary's willingness to comply with *Gambell I*, coupled with his continuing "power to control and shape the off-shore leasing process" (Pet. App. 43a), flatly contradicts amici's unsubstantiated concern that continued exploration will "[destroy] the integrity of the decision-making process" (Amici California, et al., Br. 19).[6]

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[6] Contrary to Amici NRDC's argument (Br. 18 & n.10) that the Secretary's continuing authority to remedy adverse subsistence impacts is sharply limited, subsistence impacts plainly qualify under 43 U.S.C. 1334(a)(2)(A)(i) as a type of "serious harm or damage to life (including fish and other aquatic life) * * * or to the marine, coastal, or human environment" that may justify lease cancellation. In addition, NRDC ignores that the Secretary possesses the authority to take steps short of lease cancellation, such as disapproval of production and development plans, to respond to subsistence concerns. See 43 U.S.C. 1351(h)(1); see also *Village of False Pass* v. *Clark*, 733 F.2d 605, 614-615 (9th Cir. 1984).

Finally, the contentions of respondents and amici prove too much. Under their view, the only appropriate remedy in this case would be to void the lease sale itself because any "post hoc" compliance would subvert the purposes of Section 810. See, *e.g.*, Amici NRDC, et al., Br. 11 ("Pre-decision consideration is the raison d'etre of section 810(a), and allowing post hoc compliance * * * is unquestionably contrary to the purposes of Section 810."); Amici California, et al., Br. 16.[7] Under that view, even the Ninth Circuit's standard for the issuance of injunctive relief—which allows for denial of injunctive relief that would cause environmental harm or disrupt long-term contracts (see Pet. App. 16a-17a)—would be impermissible.[8] Presumably for this reason, respondents ultimately acknowledge that Congress did not intend to require that a court void the lease sale in all instances and specifically admit that "[i]f the Secretary can approach a post-sale compliance effort with an open mind, and the tribal villages submit that he cannot, the proper remedy is an order maintaining the status quo until he complies" (Resp. Br. 48). Having accepted the principle that a remedy of post-sale compliance (without voiding the lease sale) is not necessarily inconsistent with Section 810's purposes, respondents, however, fail to explain why continued exploration may not similarly be acceptable in

[7] The argument of Amici NRDC, et al. (Br. 12-14) and Amici California, et al. (Br. 17-18) that courts must grant injunctive relief for violations of mandatory procedural requirements in order to avoid breaching separation of powers principles is hopelessly overbroad. In any event, essentially the same argument was squarely rejected by this Court in *Romero-Barcelo*.

[8] Notably, the court of appeals never explains the basis for its creation of these two exceptions to its otherwise sweeping per se injunction rule. These exceptions, however, confirm our view that the mandatory nature of Section 810's procedural requirements is relevant to the threshold question of whether Section 810 has been violated but does not answer the question of what is an appropriate remedy to address a violation in a particular case.

some cases.[9] Respondents, therefore, are left only with their wholly unsubstantiated accusation that the Secretary cannot, in their view, keep an "open mind" in this particular case (*ibid.*). The record provides no support for this allegation of bad faith directed against the Secretary.[10]

2. In our opening brief (Br. 27-36), we demonstrated that respondents' claim that Section 810 of ANILCA applies to the OCS is contradicted by the language of ANILCA, its statutory purposes, and its legislative history. We further showed (Br. 36-43) that respondents' claim that any ambiguity in the geographic scope of Section 810's application should be resolved in favor of the interests of Native Alaskans was misdirected both because no ambiguity exists in the first instance and because, in any event, the canon of statutory construction favoring the resolution of ambiguities in favor of Indians has little bearing on a legal issue that is not peculiar to the interests of Native Alaskans. Respondents, for the most part, do not address the affirmative points made in our brief. Perhaps most notably, neither respondents nor the State of Alaska, as amicus curiae, seriously disputes

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[9] See, *e.g.*, *Alaska* v. *Andrus*, 580 F.2d 465, 485-486 (D.C. Cir.) (injunction barring OCS exploration inappropriate, notwithstanding NEPA violations, because Secretary's opportunity to choose among alternatives not dependent upon cessation of exploration), vacated in part on other grounds, 439 U.S. 922 (1978).

[10] Respondents also wrongly claim (Br. 40-41) that the Secretary invited a preliminary injunction against exploration in *Gambell I*. *Gambell I* concerned only Lease Sale 57 and did not include a challenge to exploratory drilling. Hence, when the Secretary contended in *Gambell I* that, even if a violation of Section 810 had occurred, "there is no need to undo what has already been done[;] [t]he proper role for the court is to simply maintain the status quo while the Secretary does whatever is necessary to comply" (Pet. App. 3a), the Secretary was not "requesting" an injunction, but was merely arguing against rescission of the sale. No doubt for this reason, the court of appeals in *Gambell II* refers to the Secretary's brief in *Gambell I* only in its recitation of the facts (see *ibid.*) and in no manner bases its decision on the ground suggested now by respondents.

our contention that the term "public lands" has traditionally applied only to onshore holdings of the federal government.[11] In this reply, therefore, we need address only a few discrete arguments set forth in respondents' brief.[12]

a. Respondents and amicus Alaska attempt to avoid the force of our argument that areas of the OCS are not "public lands" within the meaning of ANILCA—because they are not "lands the title to which is in the United States" (16 U.S.C. 3102(2))[13]—by contending (Resp. Br. 22-24; Amicus Alaska Br. 12-13) that "lands" includes "interests therein" (16 U.S.C. 3102(1)) and that the United States does claim title to the oil and gas resources within the OCS. Accordingly, respondents argue, leasing of the mineral resources constitutes a disposition of "public lands." Respondents' statutory patchwork, however, is flawed in several fundamental respects.

First, "public lands" is defined as land "situated in Alaska" (16 U.S.C. 3102(3)), and, like the OCS itself,

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[11] Nor could they because, as explained in our opening brief (Br. 29-30), the limited nature of sovereign interests in the OCS is an important aspect of international law. See *The United Nations Convention on the Law of the Sea*, art. 77 (1982); 19 Weekly Comp. of Pres. Doc. 383-385 (Mar. 10, 1983). Indeed, a contrary view would be potentially inconsistent with the settled rights of all nations to undertake such essential activities as the laying of submarine cables and pipelines on the OCS. See *Law of the Sea*, art. 79; 19 Weekly Comp. of Pres. Doc., *supra*, at 384-385.

[12] We do not address respondents' initial lengthy argument (Br. 12-21) that they possess aboriginal title to portions of the OCS because that issue is the subject of their cross-petition in No. 85-1608; this Court has not yet acted on that cross-petition and, therefore, the issue is not before the Court in this case. See Sup. Ct. R. 34.1(a). In addition, as explained at length in our opposition to that cross-petition (at 5-9), the aboriginal title issue has no bearing on the geographic scope of Section 810, which is at issue in this case.

[13] Contrary to respondents' contention (Br. 23 n.24), we are not raising a separate issue concerning "title." The question of "title" is simply part of the analysis of the broader question whether "public lands," as used in ANILCA, includes the OCS, which is an issue that was both briefed in and decided by the courts below.

the mineral resources within the OCS are, by definition, outside Alaska's three-mile seaward boundary (even as far as 350 miles). See Fed. Pet. Br. 29. Shifting the focus away from the seabed and to the mineral resources does not remove this threshold obstacle to respondents' claim. Second, respondents' contention that the United States claims title to the mineral resources of the OCS rests on a false premise because, while Congress asserts its sovereign right to control the development of those resources (including the receipt of royalty payments), Congress has carefully avoided claiming formal title to the mineral resources of the OCS. See, *e.g.*, 43 U.S.C. 1302.[14]

b. Respondents' argument (Br. 24) that "Congress routinely asserts that the United States holds title to the OCS for purposes of domestic legislation" is similarly unpersuasive. To be sure, Congress has on a few isolated occasions expressly excluded the OCS from the definition of "public lands," out of an apparent abundance of caution, but that hardly demonstrates that Congress has abandoned the distinction it has historically drawn between "title" to and "jurisdiction and control" over the OCS.[15] Indeed, as described in our opening brief (Br.

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[14] A formal claim of title to oil and gas in the ground (not yet reduced to possession) need not be a prerequisite to a right to develop those resources. See *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190, 208-209 (1900); 1 H. Williams & C. Meyers, *Oil and Gas Law* §§ 203.I-203.3 (1985).

[15] Neither respondents nor Alaska attempts to rebut our explanation (Fed. Pet. Br. 32 n.20) of why the parenthetical exclusion of the OCS from the coverage of Section 1001(a) of ANILCA does not reveal a congressional assumption that the phrase "Federal lands * * * in Alaska" would otherwise include it. The explicit exclusions in the two other statutes discussed by respondents (Br. 24), the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1702(e), and the Archeological Resource Protection Act (ARPA), 16 U.S.C. 470bb(3), can similarly be explained. A primary impetus for FLPMA was the absence prior to that time of an "'Organic Act'" for the Bureau of Land Management. See H.R. Rep. 94-1163, 94th Cong., 2d Sess. 41 (1976) (letter from Assistant Secretary of the Interior Horton). Presumably because BLM at that time also administered leasing under the OCSLA, Congress

31), whenever the title issue has been raised, Congress has carefully and consistently stressed that "[t]he U.S. does not hold title to the OCS * * *." See, *e.g.*, H.R. Rep. 99-300, 99th Cong., 1st Sess. 591 (1985). It is not surprising, therefore, that respondents have not cited a single instance in which Congress has included the OCS within the meaning of "public lands" in a federal statute.

c. Respondents' reliance (Br. 26-33) on ANCSA to support their contention that the OCS is "in Alaska" for the purposes of Section 102(3) of ANILCA, is misplaced. As explained at length in our opening brief (Br. 37-39), although both ANILCA and ANCSA employ the phrase "in Alaska" and the two statutes share certain common roots, their statutory contexts are wholly different and indicate different geographic scopes. In particular, in Section 4(b) of ANCSA, 43 U.S.C. 1603(b), the phrase is used in the context of language which extinguished "all" aboriginal title claims, whether on private, state or federal lands, or "submerged land underneath all water areas, both inland and offshore," while in Section 102 of ANILCA, there is no reference to offshore lands, and no broad legislative purpose to encompass all types of claims, wherever located. Compare S. Conf. Rep. 92-581, 92d Cong., 1st Sess. 40 (1971).[16] Indeed, as we pointed out

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expressly excluded the OCS to dispel any possible suggestion that this new "Organic Act" affected OCS leasing. Similarly, Congress likely explicitly excluded the OCS from the geographic scope of the ARPA to ensure preclusion of any federal ownership claims to shipwrecks located on the OCS. Comparable claims had previously been made, and rejected, under the Antiquities Act. See, *e.g.*, *Treasure Salvors, Inc.* v. *Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337-340 (5th Cir. 1978).

[16] Respondents incorrectly suggest (Br. 32-33) that the United States took inconsistent positions on this point in *Gambell I* and in *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985). In *Inupiat*, the United States did not broadly contend that the phrase "in Alaska," by itself, mandated application to the OCS. Instead, we relied, inter alia, on the language of Section 4(b) of ANCSA, which expressly extinguishes claims to "submerged land underneath all wa-

in our opening brief (Br. 36, 40-41), the legislators who passed ANILCA repeatedly stressed their intention not to affect development of the OCS.[17]

d. Respondents also mistakenly contend (Br. 28) that the testimony of the Alaska Federation of Natives (AFN) supports their view of the geographic scope of Section 810. As we explain in our opening brief (Br. 42-43 & n.28), however, the AFN proposal actually confirms our view that all parties assumed that the OCS was outside the scope of ANILCA. Indeed, the very excerpt from the AFN testimony upon which respondents rely (Br. 28) reveals that the AFN urged application of Title VIII of ANILCA only to "subsistence uses on all Federal public lands."[18] In any event, the missing link in respondents'

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ter areas, both inland and offshore," and on Section 4(c)'s extinguishment of all claims "based on" claims to land and water areas "in Alaska," which would necessarily include aboriginal claims to the OCS. See Fed. Defs. Reply Mem. in Support of Mot. for Judgment on the Pleadings at 22-23; see also U.S. Br. 34 & n.22, *Inupiat Community* v. *United States*, 746 F.2d 570 (9th Cir. 1984), cert. denied, No. 84-1801 (Oct. 7, 1985).

[17] Respondents erroneously contend (Br. 31-32) that those statements regarding the limited scope of ANILCA applied only to nonsubsistence provisions of that Act. In fact, Representative Young of Alaska, when specifically asked about the scope of the subsistence provisions of ANILCA during a 1978 hearing, stated that they encompassed "all Federal lands—and that is two-thirds of the State" (see *Alaska Lands—Part 2: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 2d Sess. 449 (1978)). Of course, the reference to "two-thirds of the State" rebuts any suggestion that the congressman intended to include the OCS, which is more than twice the size of the State (see Fed. Pet. Br. 36).

[18] The map to which respondents refer (Br. 29 n.28 citing Pltfs. Exh. I (attached to Pltfs. Mot. for Summary Judgment, *Gambell* v. *Watt*, No. N83-3 (D. Alaska))) in no manner suggests that the natives were entitled to areas of the OCS. As explained in an affidavit submitted by a Department of the Interior official and filed with the trial court in *Gambell I* (see Fed. Defs. Exh. E, at 4 (attached to Fed. Defs. Resp. to Pltfs. Mot. for Summary Judgment)), the boundary lines on the map were protracted across off-

argument, apart from any convincing showing that the AFN believed that Title VIII extended to the OCS, is any showing that *Congress* intended that result. Whatever the subjective intent of the AFN, it is the intent of Congress, and not of the AFN, which is at issue here, particularly because, as respondents readily acknowledge, Congress did not adopt the AFN proposal (see Resp. Br. 29 n.28).[19]

e. Respondents contend (Br. 31) that Congress's inclusion of the Fishery Conservation and Management Act, 16 U.S.C. (& Supp. II) 1801-1802, in the ANILCA savings clause (see 16 U.S.C. 3125(4)) demonstrates legislative intent to extend the geographic scope of Title VIII to the OCS because ANILCA could not affect fishery management unless it applied beyond the territorial sea. The premise of this argument is flawed from the outset, however, because, as even respondents concede (Br. 31), the Fishery Conservation and Management Act applies onshore in some instances (see, *e.g.*, 16 U.S.C. 1801(a)(1) and (b)(1), 1856(b)(1)). Hence, the mere addition of that Act along with several others to a laundry list of statutes that were not to be deemed modified or repealed by Title VIII sheds no light on whether Congress contemplated that Title VIII would apply to the OCS.[20] Of greater sig-

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shore waters simply to indicate native entitlement to various islands and rocks and not to suggest any entitlement to the OCS itself.

[19] In extending the scope of Title VIII beyond conservation units to include all public lands, Congress was simply rendering the geographic scope of ANILCA equivalent to the scope of the withdrawal provisions of Section 17(d)(1) of ANCSA, 43 U.S.C. 1616(d)(1), which, unlike the extinguishment provision of Section 4(b) of ANCSA, plainly apply only to onshore lands (see Fed. Pet. Br. 33). There is no suggestion in the legislative history that Congress intended that ANILCA, including Title VIII, would be broader in scope than Section 17(d)(1) of ANCSA.

[20] Congress added several statutes to the savings clause when it added the Fishery Conservation and Management Act. Compare H.R. 39, 95th Cong., 2d Sess. § 716(4) (Oct. 15, 1978) with H.R. 39, 95th Cong., 2d Sess. § 713 (May 23, 1978); see also Staff of House Comm. on Interior and Insular Affairs, 95th Cong., 1st Sess., Show-

nificance, however, is that Congress extended subsistence protection to "public lands" in Alaska at the same time that Congress was considering the OCSLA Amendments of 1978. Had Congress intended that "public lands" were to include the OCS, as respondents claim, there surely would have been some discussion of the relationship between the two statutory schemes; yet there is none.[21]

f. Finally, Alaska's contention (Br. 17-19) that our view of ANILCA's geographic scope would subvert the congressional purpose of protecting subsistence uses misapprehends ANILCA's statutory focus. In ANILCA, Congress plainly did not intend to protect all subsistence uses and resources in Alaska. Instead, Congress sought only to protect those uses and resources occurring on "public lands," and, thus, specifically declined to extend similar protection to State, private, or native lands, including those State lands located within the three mile band of submerged offshore land belonging to Alaska. See gen-

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ing The Substitute [H.R. 39] Adopted By The Subcomm. On General Oversight And Alaska Lands 95 (Comm. Print 1978).

[21] Indeed, the scant legislative history concerning the relationship between the two statutes reveals that members of Congress intended to keep the two programs separate. For example, when a witness testified at an ANILCA hearing in favor of native organization involvement in OCS development, Representative Seiberling responded that "this subcommittee [on General Oversight and Alaska Lands] does not have jurisdiction over either coastal zone management or Outer Continental Shelf development," and suggested that "since we have reported out an OCS bill with respect to oil leasing [the OCSLA Amendments of 1978], perhaps we can review that in light of some of these comments." *Inclusion of Alaska Lands in National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems: Hearings Before the Subcomm. on General Oversight and Alaska Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 1st Sess. Pt. XIII, 18-19 (1977). Possible conflicts with federal ocean policy were also a primary factor behind congressional rejection of efforts to extend ANILCA refuge protections seaward. See S. Rep. 95-1300, 95th Cong., 2d Sess. 149-150 (1978); see also 124 Cong. Rec. 18025-18026 (1978) (ANILCA was "intended to be a land bill") (remarks of Sen. Stevens).

erally 16 U.S.C. 3111, 3112.[22] Whether Alaska has decided to enact legislation to protect subsistence resources in the three-mile belt of ocean under its control is, therefore, irrelevant to the distinct issue of what Congress intended in ANILCA. We note, moreover, that Alaska does not contend that it has enacted any state law provision equivalent to Section 810.

3. In our opening brief (Br. 43-47), we showed that the court of appeals erred in holding that the mere possibility of a subsistence restriction at the development and production stage requires the Secretary at the leasing stage to fulfill the notice, hearing, and findings requirements contained in the second sentence of subsection 810 (a). In response, respondents mischaracterize our position before this Court, including our view of the relationship of Section 810 to leasing of federal lands.

a. First, respondents wrongly claim (Br. 33) that we have conceded that the Department of the Interior violated the threshold evaluation requirement set forth in the first sentence of Section 810(a). In fact, neither the district court nor the court of appeals questioned the adequacy of Interior's compliance with the subsistence evaluation requirement in preparing the post-sale subsistence analysis for Sale 57 (see Pet. App. 12a-14a),[23] and we

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[22] As we have shown in our opening brief (Br. 35), moreover, inclusion of the OCS within "public lands" is not necessary to protect seagoing subsistence resources, since numerous other federal statutes serve that purpose.

[23] Nor, as respondents allege (Br. 35), did either court "ignore[]" the post-sale analysis for Sale 57, or question the propriety of the Secretary's performance of such an analysis under these circumstances. Contrary to respondents' characterization, that analysis did not amount to a post-hoc explanation prepared for litigation, but was intended to cure the error found by the court of appeals in *Gambell I*. It is commonplace for courts to allow agencies to cure errors in post-hoc proceedings, without voiding completed transactions or interrupting ongoing activities. See, *e.g.*, *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980); *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1311 (D.C. Cir. 1980). Notably, none of the cases cited by respondents (Br. 35) involved a statutory scheme, such as the OCSLA, where compliance proceeds in stages

have certainly never conceded the point.[24]

b. Respondents (Br. 34, 36) and Alaska (Br. 26, 27, 29-30) also erroneously contend that under our view the Secretary would never need to comply with Section 810 (a)(1)-(3) procedures at the lease stage and, as a result, the word "lease" in Section 810 would be read out of the statute.

We do not contend that Section 810's notice, hearing, and findings requirements are never triggered at the lease sale stage, but only that those procedures are not triggered where, as in this case, there is only a remote possibility of significant subsistence restrictions occurring at a later stage. Where the Secretary could conclude at the lease sale stage that such a significant restriction would occur at a later stage, the additional procedural requirements of Section 810 would have to be met at the lease sale stage.

For this reason, notwithstanding respondents' and Alaska's claim to the contrary, our view of Section 810 would not read the word "lease" out of Section 810. Even more fundamentally, however, the significance of the word "lease" in Section 810 does not turn on whether that provision applies to the lease stage (assuming Section 810 applies to the OCS at all), but rather on what *type* of lease triggers those additional procedural requirements.

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and the results of a post-stage analysis at one stage can inform subsequent decisions made at a later, more critical stage.

[24] Respondents (Br. 34 n.29) confuse our argument, based on the explicit Sale 57 post-sale analysis under Section 810, that Section 810 had been satisfied, with our alternative argument that "substantial compliance" with Section 810 was achieved prior to Lease Sales 57 and 83 on the basis of the assessments included in the environmental impact statements prepared by Interior. The courts below rejected the substantial compliance argument on the ground that the Secretary did not have the mandate of Section 810 "clearly in mind" when he carried out his substantial pre-sale evaluations of subsistence (see Pet. App. 8a, 37a). While we disagree with the courts' elevation of form over substance, we elected not to raise this issue in our petition for a writ of certiorari. Our omission of that issue in our petition, however, certainly does not amount to a concession that the studies underlying the subsistence evaluation were inadequate.

As this Court has explicitly found, a lease under the OCSLA, unlike many *onshore* leases, "entails no right to proceed with full exploration, development, or production," but conveys "only a priority in submitting plans to conduct those activities" (see *Secretary of the Interior* v. *California*, 464 U.S. 312, 339 (1984)). Respondents nonetheless argue (Br. 39) that Section 810's additional procedures must be followed at the OCS lease sale stage because "leasing constitutes an irrevocable commitment of resources." As this Court made clear in *Secretary of the Interior* v. *California*, 464 U.S. at 336-337, however, the grant of a lease under the OCSLA does not include express or implied approval of exploration, development, or production. Respondents' position, therefore, conflicts with the congressional decision, recognized by this Court in *Secretary of the Interior*, to separate the stages of OCS development in order to forestall premature litigation regarding potential environmental effects that might occur, if at all, only at later stages (see *id.* at 341).

c. Finally, respondents' argument (Br. 37-38) that this Court should reject the Secretary's reasonable interpretation of the word "would" in Section 810 is unpersuasive. Respondents do not offer any meaningful support for their view that Congress intended "may" when it said "would." In any event, even if their proposed construction were plausible, the only issue before this Court is whether the Secretary's own construction was reasonable (see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). In this case, the Secretary's determination that "would significantly restrict" means "likely" to significantly restrict constitutes a reasonable interpretation of the statute.[25]

Indeed, the cases concerning the meaning of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. 4332(2)(C), upon which respond-

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[25] We note that the Secretary's standard is certainly more favorable to respondents than other accepted meanings of "would" rejected by the Secretary. For example, contrary to Alaska's suggestion (Br. 30), the Secretary has not taken the position that "would" means a certainty of restrictions.

ents rely (Br. 37-38), not only fail to question the reasonableness of the Secretary's interpretation in this case, but they underscore the propriety of judicial deference to reasonable agency statutory construction. First, Section 102(2)(C) of NEPA does not even employ the word "would." It simply refers to "major Federal actions significantly affecting the * * * human environment." Judicial decisions concerning the meaning of Section 102(2)(C), therefore, do not support respondents' claim that "would" in Section 810 should be construed to mean "may." In addition, there are explicit indications in Section 102(2) that "may" is the relevant standard. See, *e.g.*, 42 U.S.C. 4332(2)(A) ("decisionmaking which *may* have an impact on man's environment") (emphasis added); 42 U.S.C. 4332(2)(D)(iv) ("any action or any alternative thereto which *may* have significant impacts") (emphasis added). No comparable indications exist in Section 810. Finally, the federal agency responsible for NEPA's implementation has construed Section 102 to turn on the "may" standard (see 40 C.F.R. 1508.3) and that agency construction is entitled to substantial judicial deference. Here, the Secretary has construed the word "would" in Section 810 to mean "likely to" and that plainly reasonable interpretation should similarly be entitled to judicial deference.

4. In our opening brief (Br. 47-49) we argued that the decision of the court of appeals in *Gambell I* (even if correct, which we contest) should not be applied retroactively to lease sales held before the court of appeals' decision. Respondents do not contest our argument (Fed. Pet. Br. 47-49) that retroactive application would, without furthering ANILCA's statutory purposes, disrupt OCS exploration and development as well as financial arrangements made in reliance on the Secretary's prior construction. Instead, respondents argue (Br. 49) that retroactivity is not involved in this case, because "the legal challenges were made *before* the parties acted" (emphasis in original). This claim lacks merit.

The legal challenge to Lease Sale 83 was filed more than a year after that sale and almost four months after

the first exploration plan was approved (see Fed. Pet. Br. 8-9). Consequently, the legal challenge was made *after* and not "before the parties acted." [26] In addition, it is no bar to our retroactivity claim that *Gambell I* involved the very challenge to Lease Sale 57 at issue in this case. In *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 718-723 (1978), this Court held that retroactive relief was improper in a case, such as this one, in which the principle of law upheld was first announced by the lower courts in that same case. We submit that similar considerations govern this case (see Fed. Pet. Br. 48-49).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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Solicitor
Department of the Interior

DECEMBER 1986

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[26] As we explained in our opening brief (Br. 48-49), retroactive application of *Gambell I* to Lease Sale 83 would be particularly inequitable because at the time that lease sale was held, the district court in the Lease Sale 57 case had ruled that Section 810 did not apply.

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